United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6104

To Be Argued By
WALLACE MUSOFF

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-6104

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
SALVATORE CIRAMI, ET AL.,
Defendants,
SALVATORE CIRAMI & MARGARET CIRAMI,
Defendants-Appellants.

B
P/S

BRIEF FOR DEFENDANTS-APPELLANTS

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CITATIONS

Cases

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Title 28 United States Code, Rule 60.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons, (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-6104

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

vs.

SALVATORE CIRAMI, et al.

Defendants,

SALVATORE CIRAMI & MARGARET CIRAMI

Defendants - Appellants,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

QUESTIONS PRESENTED

1. Whether the finding of the Court below that the defendants-appellants have not shown compelling circumstances to grant their motion, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, to vacate summary judgment, is clearly erroneous?

2. Whether the United States District Court erred as a matter of law in determining that defendants-appellants did not move to vacate summary judgment, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, within a reasonable period of time?

3. Whether summary judgment can be sustained if material issues of fact exist and such summary judgment will preclude a factual determination on the merits?

PRELIMINARY STATEMENT

Salvatore Cirami ("Cirami") and Margaret Cirami appeal from a Memorandum Decision and Order by the Honorable Walter Bruchhausen, United States District Judge, Eastern District of New York, filed on October 6, 1975, denying defendants-appellants' motion, pursuant to Rule 60(b) (6) of the Federal Rules of Civil Procedure, to vacate summary judgment entered against them on June 12, 1974, in the amount of $270,792.43, plus statutory interest.

FACTS

During the years 1961, 1962 and 1963, Cirami operated, as a sole proprietorship, a business known as Air Freight Haulage Co., which was engaged in the business of supplying truck transportation services for merchandise of its customers. (A 79) In the regular course of conducting his business, Cirami caused contemporaneous books and records to be maintained reflecting the receipts and expenditures of Air Freight Haulage Co. (A 79)

To insure that the books and records of Air Freight Haulage were properly maintained, Cirami employed the services of two registered public accountants, Seymour Unterberg and Bernard Zipern (A 86 - A 90)[1]. Since Mr. Cirami operated Air Freight Haulage Co. as a sole proprietorship during the years 1961, 1962 and 1963, the income and expenses of the business were reflected on his individual income tax returns for each of the calendar years 1961, 1962 and 1963.[2] (A 6 - A 26)

An audit of the tax returns of Salvatore and Margaret Cirami for each of the years 1961, 1962 and 1963 was conducted by Internal Revenue Agent Edward Carroll. Mr. Carroll's report reflects wholesale disallowances of claimed business expenses for each of the years 1961, 1962 and 1963, on the theory that such expenses were not substantiated. (A 27 - A 41) The revenue agent made no adjustments to the gross receipts of Air Freight Haulage Co., as reflected on Salvatore Cirami's income tax returns for each of the years involved. Gross income for each of such years was therefore determined to be correctly reported.

Further adjustments made to the 1962 and 1963 tax returns were the total disallowance of all itemized deductions

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1 Both Unterberg and Zipern submitted affidavits in connection with the services rendered to Salvatore Cirami. Each stated that they performed monthly bank reconciliations and verified the disbursements made in the cash disbursements journal (A 86 - A 90).

2 Mr. Cirami filed joint Federal income tax returns with his spouse Margaret Cirami for each of the years 1961, 1962 and 1963.

claimed by the defendants, on the theory that they had failed to substantiate the same. (A 36, A 40)

On September 14, 1966, a statutory notice of deficiency was forwarded to Salvatore and Margaret Cirami reflecting the disallowances set forth in the report of Edward Carroll. (A 42 - A 46)

On September 21, 1966, Louis DeStefano, then Mr. Cirami's accountant, wrote the District Director of Internal Revenue advising that he was protesting the determinations set forth in the statutory notice. (A 47) On September 28, 1966, the District Director of Internal Revenue, Brooklyn, New York, wrote Mr. DeStefano acknowledging receipt of his letter of September 21, 1966 and advising the matter was under consideration. (A 48)

In reliance upon the District Director's response, a petition to the United States Tax Court, pursuant to Title 26 USC, Section 6213, was not filed. On March 3, 1967, assessments were made against the taxpayers for each of the years 1961, 1962 and 1963 in the amounts set forth in the statutory notice of deficiency. (A 63)

On February 28, 1973, the plaintiff-appellee commenced

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3 The items disallowed, purportedly for lack of substantiation, were reflected in the books and records of Air Freight Haulage Co. See the analysis done by Seymour Unterberg. (A 91 - A 144)

an action against defendants-appellants and their son, James Cirami, in the United States District Court, Eastern District of New York. The government sought to reduce to judgment the Federal tax assessments against Salvatore and Margaret Cirami, arising out of the income tax liabilities for 1961, 1962 and 1963, to set aside certain transfers made to James Cirami by Salvatore Cirami, to foreclose the tax liens against certain properties and rights to such properties alledgedly belonging to Salvatore and Margaret Cirami, and to obtain a judment against James Cirami, as a transferee of assets of Salvatore Cirami. (A 49-A55)

The defendants, in an effort to defend the action brought against them, retained the services of Peter Newman, Esq., 23 Gary Road, Syosset, New York, to represent them. Mr. Newman filed an answer on behalf of his clients, on March 20, 1973, which, in essence, was no more than a general denial of the allegations set forth in the complaint. In addition, a counterclaim was made on behalf of Salvatore and Margaret Cirami. (A57 - A 58)

Pursuant to a motion filed on May 17, 1973 by the United States, a Memorandum and Order dated October 2, 1973 was issued by the Honorable Walter Bruchhausen, United States District Judge, Eastern District of New York, dismissing the counterclaim of defendants Salvatore and Margaret Cirami. The Notice of Motion was sent to Mr. Newman, the defendants

being unaware of it. No opposition was filed by defendants' counsel, Peter Newman, Esq., to such motion, when, in fact, there were sufficient factual and legal bases to oppose such motion.[4]

On June 12, 1974, partial summary judgment was entered in favor of the United States to the extent that plaintiff now has a final judgment against Salvatore and Margaret Cirami for income tax liabilities for the calendar years 1961, 1962 and 1963 in the amount of $270,792.43, plus interest from the date of Entry. (A 74) On July 5, 1974, Notice of Entry of Judgment was filed. (A 2)

Subsequent thereto, defendant-appellant Salvatore Cirami changed legal counsel to Carl Mione, Esq. and defendant-appellant Margaret Cirami substituted the firm of Wagman, Cannon & Musoff, P.C. as counsel.[5]

On May 1, 1975, defendants-appellants filed a Notice of Motion, returnable before the Honorable Walter Buchhausen, United States District Judge, Eastern District of New York, on May 27, 1975, together with supporting papers, for an order vacating the summary judgment entered in favor of the plaintiff-appellee against the defendants-appellants on June 12, 1974,in

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4 The factual basis for opposing the Motion for Summary Judgment is the existence of books and records which substantiate the disallowed expenses. The legal basis for opposing the motion is that even without considering the records, the defendant-appellant would be entitled to an allowance of a reasonable amount of business expenses. Cohan v. Commissioner, 39 F.2d 540 (2d Cir 1930)

5 A Notice of Appearance was filed on behalf of Wagman, Cannon & Musoff, P.C. on December 23, 1974. (A 76) Salvatore Cirami substituted counsel on August 28, 1974.

the amount of $270,792.43, plus statutory interest. (A 77)

On May 27, 1975, a hearing was held in the chambers of Judge Buchhausen. As a result, defendants-appellants were granted leave until July 1, 1975 to file additional data in support of the Motion to Vacate Summary Judgment.

On July 1, 1975, defendants-appellants submitted additional factual data to support the motion. The documentation consisted of affidavits from the two accountants, Seymour Unterberg and Bernard Zipern, who audited the books and records of Air Freight Haulage Co. during the years 1961, 1962 and 1963, a series of thirty exhibits of records of Air Freight Haulage Co. from the years 1961, 1962 and 1963, including the check disbursements journal from January 1959-November 12, 1963, the check stubs from March 4, 1961-June 16, 1972 and April 16, 1963 through August 10, 1963[6] and payroll books for the years 1961, 1962 and 1963, and an analysis by Seymour Unterberg verifying substantially all the business expenses claimed on the tax returns of defendants-appellants for the years 1961, 1962 and 1963 per the available records, as submitted to the Court.[7] (A 86 - A 148)

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6 The cancelled checks could not be located.

7 Copies of all records submitted to the Court were timely submitted to plaintiff-appellee.

On September 3, 1975, the plaintiff-appellee filed a Supplemental Memorandum in Opposition to taxpayer's Motion to Vacate Summary Judgment. Ostensibly, this memorandum was to respond to the data submitted. In fact, it did not. The sum and substance of the government's response was that the affidavits of the two accountants who did the bank reconciliations for Air Freight Haulage Co., verifying that the checks set forth in the check disbursements journal were cancelled, did not, in the absence of the actual cancelled checks, corroborate payment. Second, the government, by citing a conviction of Salvatore Cirami for the years 1967 through 1970, four years subsequent to the last taxable year involved in the instant case, for activities involving a separate and distinct corporate entity, Air Package Distribution Service Ltd., not Air Freight Haulage Co., endeavored to persuade the District Court that the Ciramis were not worthy of relief under Rule 60(b) (6) of the Federal Rules of Civil Procedure. If such not be the case, what then was the purpose of the introduction of such conviction? Surely the government cannot contend that a conviction for activity involving a different entity taints such individual four years earlier?

On October 6, 1975, Judge Bruchhausen issued a Memorandum and Order denying defendants Motion to Vacate Summary Judgment. (A 149 - A 152) The substance of the Court's opinion was that a motion pursuant to Rule 60(b) (6) was not timely, i.e., not made within a reasonable period of time; the defend-

ants did not overcome the presumption of correctness of the assessments,[8] and extraordinary circumstances to grant the relief under Rule 60(b) (6) have not been shown.

Additional facts relevant to the issues raised in this appeal are discussed under those individual points.

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8 The Court states as part of its opinion:

> "As a matter of fact, the defendants were convicted of attempted evasion of taxes and aiding in the preparation of false tax information returns..." (A 152)

The relevancy of such statement, in view of the fact that it involved the years 1967 through 1970 and a different business entity, is beyond comprehension.

POINT I

> The finding of the Court below that the defendants-appellants have not shown compelling circumstances to grant their motion to vacate Summary Judgment pursuant to Rule 60(b)(6) is clearly erroneous.

The finding of the Court below that defendants-appellants have not shown compelling circumstances to vacate the summary judgment entered against them on June 12, 1974, in the amount of $270,792.43, plus statutory interest, a judgment which they shall bear the remainder of their lives, is not in conformity with the import of the statute and the facts, and therefore is clearly erroneous.

Rule 60(b)(6) provides as follows:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment ... for the following reasons:
> ...or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time....

The purpose of the foregoing provisions of Rule 60 has been judicially determined to afford equitable principles of relief. The United States Supreme Court in Klapprott v. United States, 335 U.S. 601, 614 (1949), modified 336 U.S. 942 (1949) stated:

> In simple English, the language of the other reason clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.

In 1953, Judge Learned Hand, in United States v. Karahalias, 205 F.2d 331, 333 (2nd Cir 1953), saw Rule 60(b)(6) to provide for equitable relief and to relieve undue hardship. That the judicial view of Rule 60(b)(6) is expansive and not constricted is best stated by the Fifth Judical Circuit in Menier v. United States, 405 F.2d 245, 248 (5th Cir 1968) when the Court asserted that:

> Clause (6) is a grant reservoir of equitable power to do justice in a particular case where relief is not warranted by the preceding clauses. 7 Moore, Supra, Par. 60.27 [3], at 308.

See Pierre v. Bernuth, Lembcke Co., 20 F.R.D. 116, 117 (S.D.N.Y. 1956). In Smith v. Jackson Tool & Die, Inc., 426 F.2d 5, 8 (5th Cir 1970), Rule 60(b) (6) was interpreted as follows:

> The policy of finality of judicial proceedings is, and indeed it should be, a strong one, but in the face of unusual factors, equitable principles encompassed within Rule 60(b) justify further inquiry. Rule 60(b) provides that the trial court may grant relief for "any other reason justifying relief from the operation of the judgment." It has been said that this rule's purpose is to make available those grounds which equity has long recognized as a basis for relief. Bros. Inc. v. W.E. Grace Manufacturing Co., 320 F.2D 594 (5th Cir., 1963).
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> In ruling on a motion to vacate, equitable considerations including lack of prejudice to defendant and prejudice to plaintiff must be given consideration. And often, the interest of ruling on a motion on the merits outweighs the interest in orderly procedure and in the finality of judgments.

The defendants-appellants submit that the facts, which incomprehensibly the Court below chose to ignore, dictate a finding of compelling circumstances that is needed to overturn the finality of the instant judgment.

First, the judgment which is involved herein is not a pittance. On the contrary, it is in the amount of $270,792.43, plus statutory interest. This without more would not and should not cause a vacating of the judgment. However, the size of the judgment is merely one factor to be presented.

Second, the judgment in issue arises out of asserted income tax liabilities for the years 1961, 1962 and 1963. These liabilities did not arise from understated income or from fraudulent returns, as the government wished the Court below to infer, but from allegedly unsubstantiated deductions claimed on the income tax returns of Salvatore and Margaret Cirami for each of these years.

During such period of time Salvatore Cirami owned and operated a proprietorship known as Air Freight Haulage Co. The purpose of such business was to provide transporation services for its customers. (A 79) Books and records of the daily operations of Air Freight Haulage Co. were maintained and audited by accountants, and continue to exist for each of the years in issue, setting forth the receipts and disbursements, copies of the available records being presented to the Court. (A 79, A 145 - A 147)

These receipts and deductible expenditures were reflected on the respective tax returns of Salvatore and Margaret Cirami for each of the years in issue, 1961 through 1963. (A 6 - A 26)

For the Court below to find that such evidence could not overcome the presumption of correctness of the assessments made is incredulous. These records along with the affidavits of the two public accountants are unrefuted evidence of the substantiation of the claimed expenditures. Clearly, the plaintiff-appellee's offering of a conviction for the tax years commencing four years after the last year in issue, involving a separate and distinct entity is immaterial and irrelevant.[9] Furthermore, that conviction did not involve fraudulently claimed deductions, but rather the issue of whether certain individuals considered as independent contractors were in fact employees from whom taxes should have been withheld and upon whose earnings Social Security taxes should have been paid.

There is further compelling reason to vacate the instant judgment. The reasons lie in the actions of Revenue Agent Carroll as reflected by his report (A 27 - A 41). The revenue agent conceded that Mr. Cirami was engaged in business during the years 1961 through 1963, by making no adjustment to the gross receipts reflected on the returns for each of the years and by determining that certain claimed business expenses were allowable.

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9 Revenue Agent Carroll never asserted fraud against the appellants in connection with the years in issue and indeed no such issue ever arose in connection with the years 1961, 1962 and 1963.

Even the most cursory analysis of the adjustments made by the revenue agent raises fundamental questions as to the propriety of the disallowances. If Salvatore Cirami was in a trade or business during the years 1961 through 1963, which one must assume to be the case since the revenue agent accepted the gross receipts as reflected on Schedule C of each return, and books and records were available, it can only be concluded that such blanket disallowances were patently arbitrary and capricious. The clearest evidence of this fact is an analysis of the adjustments made by Mr. Carroll. For 1963, Mr. Carroll disallowed the entire salary expense claimed. Yet, he allowed the same expense in 1961 and 1962 and allowed all the payroll taxes paid on the 1963 disallowed salary as a business expense. (A23, A 38) Mr. Carroll also disallowed the entire insurance expense claimed in 1963. Yet, he allowed a substantial portion of such expense in 1961 and 1962. For 1963, he disallowed the entire rent expense claimed. Yet, he allowed such expense for 1962 and a large portion of such expense in 1961. Since the nature of the operations of Air Freight Haulage Co. did not change during any of the years in issue, this raises apparent questions as to the appropriateness of the adjustments. The added inconsistencies only serve to add fuel to the fire of arbitrary conduct.

Mr. Cirami's business was trucking -- the supplying of a service for the transportation of merchandise. How does one conduct such business, which generated more than $100,000 in gross receipts in each year, without incurring expenses for the utilization of trucks? Yet, the Internal Revenue Service in the face of the stark reality disallowed every major trucking expense for each of the years involved.

The arbitrary nature of the adjustments become readily apparent from the resulting net profit figures as follows:

In 1961, Mr. Cirami reported $129,502.83 in gross receipts from Air Freight Haulage Co. (A 8) After disallowances by Revenue Agent Carroll, Air Freight Haulage Co. realized net profit of $97,485.36. (A 28)

In 1962, Mr. Cirami reported $150,541.12 in gross receipts from Air Freight Haulage Co. (A 14) After disallowances by Revenue Agent Carroll, Air Freight Haulage Co. realized net profit of $116,737.28. (A 34)

In 1963, Mr. Cirami reported $103,824.11 in gross receipts. (A 22) After disallowances by Revenue Agent Carroll, Air Freight Haulage Co. had realized a net profit of $92,008.81. (A 38)

The foregoing discloses the following ratios of net profit to gross receipts as adjusted by the Internal Revenue Service:

1961	75.28%
1962	77.55%
1963	88.62%

The astronomically high profit ratio figures speak for themselves and reflect patently arbitrary and capricious adjustments.

Similar facts were presented in Cohan v. Commissioner, 39 F.2d 540 (2d Cir 1930). The Court concluded that where one was in a trade or business he, of necessity, must have related expenses. The Court stated that even if books and records were not available to substantiate such expenses, a reasonable amount must be allowed. The failure of Mr. Carroll to follow the Cohan case places his entire series of adjustments in dispute. In Helvering v. Taylor, 293 U.S. 507 (1935), the Supreme Court held that where the Internal Revenue Service makes an arbitrary and capricious determination, such determination must be set aside.

The defendants submit that in view of Cohan v. Commissioner, supra and Helvering v. Taylor, supra, the blanket disallowance of business expenses and indiscriminate disallowances of other deductions of the defendants for the years in issue and the incredible net profit ratio which arises from such adjustments, constitute arbitrary and capricious determinations of tax which should not be sustained without affording the defendants the opportunity to submit proof of such deductions.

These facts were submitted to the Court below. However, with one sentence and without any discussion of why the above stated facts were not compelling reasons to vacate summary judgment, the motion was denied. Defendants-appellants submit that, in fact, they do not owe the judgment outstanding against

them and the determination of tax due was arbitrary and capricious. These are compelling reasons to vacate the summary judgment, and the trial court's failure to consider them is clearly erroneous.

In addition to the reasons set forth above, there were additional compelling reasons for granting the appellant's motion to vacate summary judgment.

When the statutory notice of deficiency, dated September 14, 1966, was received by Salvatore and Margaret Cirami, it was given to Mr. Louis DeStefano, an accountant, to handle. The defendants were not themselves knowledgeable in such matters. Mr. DeStefano responded by erroneously writing to the District Director of Internal Revenue in Brooklyn were the statutory notice was issued. (A 47) His well meaning failure to properly advise the defendants or cause a petition to be filed with the United States Tax Court precluded the defendants from their day in Court, without having to pay in full the asserted liabilities.

Mr. DeStefano's procedural error was compounded by the letter of the Internal Revenue Service in their response to his letter of September 21, 1966, when the Internal Revenue Service advised that the matter was under consideration. (A 48) At the time such response was written, the Service representative knew that no reconsideration could be given until such time as a petition was filed with the United States Tax Court. However, as a result of DeStefano's reliance on the Internal

Revenue Service letter, the time for petitioning the Tax Court expired without Mr. DeStefano taking any action on behalf of Mr. and Mrs. Cirami. As a result of the failure to petition the Tax Court, the Internal Revenue Service assessed the liabilities which the United States sought to reduce to judgment in the instant case.

It is submitted that the abrogation of the right to file a petition with the United States Tax Court by Salvatore Cirami's accountant in reliance upon the less than candid letter by the Internal Revenue Service constitutes an equitable basis upon which to give Salvatore and Margaret Cirami the opportunity to adduce proof of their true tax liability, if any, for the years 1961, 1962 and 1963.

Until the filing of the complaint by the government in the instant proceeding, almost six years subsequent to the administrative assessments, Salvatore and Margaret Cirami were without the opportunity to challenge the validity of such assessments, lacking sufficient funds to pay the entire assessment and file claim for refund. The defendants retained Peter Newman, Esq., to represent them. Mr. Newman filed an Answer asserting general denials of the allegations and a Counterclaim. (A 57, A 58) The Counterclaim was duly dismissed, but the defendants were still entitled to challenge the underlying merits of the income tax liabilities asserted against them. United States v. O'Connor, 291 F.2d 520, 526-28 (2d Cir 1961); United States v. Lease, 346 F.2d 696, 698 (2d Cir 1965). The defendants were ready, willing and able to go forward in this respect but because of failure by then counsel, for reasons

unknown, the government was permitted to take summary judgment by default thereby saddling the Ciramis with a judgment of more than two hundred and seventy thousand dollars, which, in fact, they do not owe. See King v. Mordowanec, 46 FRD 474 (D.R.I. 1969) where the Court vacated dismissal of an action, pursuant to Rule 60(b) (6), on the grounds of gross neglect of plaintiff's original counsel.

The totality of the facts before the Court below, in view of the underlying philosophy of Rules 60(b) (6) to see justice done unquestionably establishes that the Court below erred as a matter of law in finding that exceptional and compelling circumstances do not exist in vacating summary judgment. See United States v. Karahalias, 205 F.2d 331 (2d Cir 1953).

POINT II

The Trial Court erred as a matter of law in finding that the Motion to Vacate Summary Judgment was not made within a reasonable time.

Summary judgment was entered against defendants-appellants on June 12, 1974. (A 74) The Notice of Motion to Vacate Summary Judgment was filed on May 1, 1975, less than one year after the judgment was taken. (A 77) The Court below in denying defendants' motion to vacate summary judgment concluded "...counsel has waited almost one year before moving for the relief, and under such circumstances has not moved within a reasonable time..." (A 152)

First, instant counsel were not counsel of record at the time summary judgment was taken by the government. The record unquestionably reflects that Peter Newman, Esq., was then counsel of record for the Ciramis. As a matter of fact, it was not until December 23, 1974 that Wagman, Cannon & Musoff, P.C. entered its appearance as counsel for Margaret Cirami (A 76). Within the time framework of six months, counsel earnestly and expeditiously began to assimilate the facts that evolved over the preceding thirteen years, conducted conferences with the defendants and the accountants who maintained the books and records, insured that all salient records of Air Freight Haulage Co. available for the years 1961, 1962 and 1963 were garnered and that an analysis of the records was prepared.[10] (The records assembled and submitted in support of the Ciramis' motion to vacate summary judgment are so voluminous that they occupy several cardboard cartons.) It was only until then that the Notice of Motion to Vacate Summary Judgment could have been and was prepared, together with a supporting Memorandum of Law, and filed.

The implication of the Court below that counsel waited a year before moving denotes non-action. Such is not the case. In the context of the facts involved herein, instant counsel moved expeditiously. Further, the sole time requirements for a

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10 As is obvious by the fact that prior counsel did not oppose the Motion for Summary Judgment, notwithstanding the overwhelming evidence available to show that genuine factual issues existed, there was no assistance by prior counsel from a fact-finding standpoint and all factual evidence had to be freshly developed.

Motion pursuant to Rule 60(b)(6) is that it be brought within a reasonable time. See Klapprott v. United States, supra (over four years passed before the motion); Cavalliotis v. Salomon, 357 F.2d 157 (2d Cir 1966) (approximately eighteen months); Radack v. Norwegian America Line Agency, Inc., 318 F.2d 538 (2d Cir 1963) (fifteen months); Pierre v. Bernuth, Lembche Co., supra (over three years). Counsel submit that such was the case and the finding of the trial judge is wholly without foundation in fact and therefore clearly erroneous. See McKinney v. Boyle, 404 F.2d 632, 634 (9th Cir 1968), cert. denied 89 S.Ct 1481 (1969).

Nor can appellee argue that to reopen the judgment would cause hardship. See e.g. Menashe v. Sutton, 90 F. Supp 531 (S.D.N.Y. 1950). The appellee's vested interest, as the United States of America, is to insure that the Ciramis pay in taxes no more or no less than what they actually owe for the years 1961, 1962 and 1963. It is likewise the desire of the appellants to pay in taxes no more than what they factually owe. With the evidence before the Court, i.e., the affidavits of the accountants, the available books and records and the revenue agent's report, it is clear that the amount of $270,792.43 is not the true liability of the Ciramis for 1961, 1962 and 1963.

Rule 60 (b) (6) seeks equity be done. United States v. Karahalias, supra. In filing the motion to vacate summary judgment, appellants sought the same. The failure of the trial court to take cognizance of the volume and substance of the evidence presented was error of the greatest magnitude.

POINT III

Summary judgment cannot be sustained where material issues of fact exist and such summary judgment precludes a factual determination on the merits.

On December 28, 1973, the United States filed a Notice of Motion for partial summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. In support of the Motion there was attached an affidavit from the District Director of Internal Revenue which, in substance, stated that assessments had been made against Salvatore and Margaret Cirami for their income tax liabilities for 1961, 1962 and 1963, the amount of such assessments and the date such assessment were made. (A 62, A 63) Also submitted with the motion was a memorandum of law. (A 66 - A 71) The substance of the memorandum of law was that assessments had been made against the defendants which gave rise to a prima facie case against them and that they could not overcome such prima facie case (the pleadings having set forth a general denial of the allegations of the complaint); ergo summary judgment should lie. The Court thereupon granted the motion for summary judgment, on the grounds that no opposition was made by counsel for the defendant. (A 72)

It is submitted that the motion for summary judgment should not have been granted because of the inherent existence of material issues of fact, and consequently the failure to grant the Motion to Vacate Summary Judgment was erroneous as a matter of law.

It was the burden of the government, as the moving party, to establish that there were no factual issues in dispute. Adickes v. Kress & Co., 398 U. S. 144, 157 (1970). Yet, the government in its moving papers chose to ignore facts within their possession which clearly would raise a doubt as to whether summary judgment could lie. Initially, the government had in its possession the Revenue Agent's report (A 27 - A 41) which formed the basis for the assessments against the Ciramis for the years 1961, 1962 and 1963. Even a cursory review of the disallowances as reflected in the report reveal the arbitrariness of the revenue agent. In view of this singular fact and in light of the rationale Helvering v. Taylor, supra, the summary judgment motion should not have been made, let alone granted.

Second, the government was fully aware that the underlying assessment was subject to challenge in the suit brought by the government in the Court below, since there had never been a judicial determination on the merits. United States v. Lease, supra. The government, however, never apprised the Court of this fact when it sought summary judgment.

Further, the memorandum in support of the motion for summary judgment was sufficiently vague and ambiguous so as to raise a reasonable doubt as to whether material issues of fact did exist, and such doubt should have been resolved in favor of the Ciramis. United States v. Diebold, Inc., 369 U.S. 654,655 (1962). In Doehler Metal Furniture Co. v. United States, 149 F.2d 130,135 (2d Cir 1945), this Court stated that where the slightest doubt as to the facts exists, a motion for summary judgment should be denied. The government's motion for summary judgment herein was devoid of facts as to why appellants could not overcome the assessments.

The Supreme Court in Poller v. Columbia Broadcasting, 368 U.S. 464, 467 (1962) set forth what a moving party seeking summary judgment must show. Mr. Justice Clark, in speaking for the Court, stated:

> This rule [Rule 56 (c)] authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is... [and where] no genuine issue remains for trial... [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944).

Clearly, the truth about the wholesale and arbitrary disallowances of business deductions, which gave rise to the assessments upon which summary judgment was taken, never was divulged.

The government without resort to extrinsic evidence secured summary judgment based merely upon the ministerial entry of an assessment against Salvatore and Margaret Cirami, which action standing alone it considered to be sufficient to sustain its burden. This position is revealed by the memorandum of law of Thomas Illmensee Esq , Assistant United States Attorney, submitted with the Motion for summary judgment. Mr. Illmensee's statement that "Salvatore Cirami and Margaret Cirami cannot make the required showing" to overcome the government's prima facie case is conclusory in nature and not a substitute for the requisite proof. (A 69) Adickes v. Kress & Co., supra. To allow that statement to be the sole evidence for a final judgment of more than $270,000.00 was clear error, especially so, when defendants have, in conjunction with their Rule 60(b) (6) motion, presented concrete evidence to substantiate the disallowed expenses.

In Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir 194), the Court stated:

> Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth.

Appellants submit the requisite foundation to move for and grant summary judgment was not present. To allow summary judgment to stand against Salvatore and Margaret Cirami in these circumstances would create the very situation that the Court of Appeals is speaking about in Whitaker. It would trap the unwary defendants and not arrive at the truth.

CONCLUSION

For all these reasons, the denial of defendants motion to vacate summary judgment should be reversed and the case remanded to the United States District Court, Eastern District of New York, for a trial on the merits.

Apellants also request that they be allowed costs of this appeal.

Respectfully submitted,

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December 22, 1975

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Plaintiff-Appellee, : Docket No. 75-6104

vs. :

SALVATORE CIRAMI, et al. :

Defendants, :

SALVATORE CIRAMI & MARGARET CIRAMI, :

Defendants-Apellants. :

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the Defendants-Appellants' original brief and appendix herein has been made on opposing counsel by sending by certified mail three copies of each on this twenty-second day of December, 1975, in an envelope with postage prepaid, properly addressed as follows:

The Honorable Scott P. Crampton
Assistant Attorney General
Tax Division
United States Department of Justice
Washington, D.C. 20530

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